No. 87-2037

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DAVID LAWRENCE KAHN,

Petitioner,

vs.

AVNET, INC.,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION

ALAN L. ISAACMAN
DAVID O. CARSON*
STEPHEN E. NORRIS
345 North Maple Drive,
Suite 200
Beverly Hills, California 90210
(213) 278-1111

Counsel for Petitioner

*Counsel of Record

July 29, 1988

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

No. 87-2037

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DAVID LAWRENCE KAHN,
Petitioner,

vs.

AVNET, INC.,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION

There appears to be no dispute among the parties that the issue which is the basis for Kahn's petition is ripe for review by this Court. Instead, the only issue raised by Avnet is whether this particular case is the proper vehicle for review of the "intracorporate conspiracy doctrine" in civil rights actions.

I

This Case Concerns a Conspiracy Among at Least Two Individuals and Two Corporate Entities

Avnet *admits* that there is a conflict among the circuits regarding the intracorporate conspiracy doctrine, but denies

that the conflict applies to this case because, according to Avnet, the First Amended Complaint (hereinafter "the Complaint," found at Appendix D to the Petition for a Writ of Certiorari) alleged unilateral conduct by one individual, albeit through two corporate entities. Avnet misconstrues the Complaint.

As pointed out in the Petition for Writ of Certiorari, Kahn's contention is that at least two individuals, Simon Sheib and William Scharffenberger, conspired to deprive him of his civil rights. *See* Petition at 3, 5, 17. Sheib was President of Avnet, and Scharffenberger was its Senior Vice-President.

The Complaint *pleaded* the participation of both Sheib and Scharffenberger[1] in the conspiracy. With respect to Sheib, *see* ¶¶9, 11, 12, 13 and 16. With respect to Scharffenberger, see ¶11. *See also* ¶16 ("and additional parties"). Both men were clearly alleged to have participated in the conspiracy.

Indeed, it was Scharffenberger who is alleged to have instructed Kahn to destroy evidence, the illegal act which Kahn refused to carry out, leading to his discharge.

Avnet acknowledges, in a footnote,[2] that Scharffenberger is also identified in the Complaint, but denies that the pleading was sufficient to identify him as a participant in the conspiracy. There are at least two responses to this assertion. First, the Complaint clearly identified Scharffenberger as the senior corporate officer who commanded Kahn to destroy evidence. *See* ¶11 of the Complaint (App. D at D-2 and D-3). When a superior corporate officer orders an employee to destroy evidence, such a command certainly qualifies as the use of "force, intimidation, or threat" pursuant to 42 U.S.C. §1985. In such a command there was an implied threat (which ultimately became explicit) that Kahn would lose his job if he did not obey. As one court construing §1985(2) has noted, "intimidation can take many forms." *Hoopes v.*

---

1 The Complaint, Appendix D to the Petition, did not name Sheib and Scharffenberger by name. Instead, it referred to them by their corporate offices: President and Senior Vice-President of Avnet.

2 Footnote 7 to Brief for Respondent Avnet, Inc. in Opposition.

Nacrelli, 512 F. Supp. 363, 368 (E.D. Pa. 1981). Scharffenberger therefore engaged in a key illegal act to carry out the goals of the conspiracy.[3]

Second, even if more was required to be pleaded in order to make Scharffenberger a participant in the conspiracy, the proper ruling would not have been to dismiss the claim, but rather to require a more definite statement as to Scharffenberger's role in the conspiracy. *See* Rule 12(e), Fed.R.Civ.P.

Finally, the Complaint pleaded that the conspiracy also included "additional parties (who will become known during discovery)." App. D at D-3, ¶16. Given that the dismissal came at the pleading stage, surely it was improper to foreclose plaintiff from seeking to prove the participation of even more individuals in the conspiracy.

II
Kahn Otherwise Stated A Claim Pursuant to 42 U.S.C. §1985(2)

Half of Avnet's argument is devoted to its contention that for reasons *apart from* the applicability of the intracorporate conspiracy doctrine, Kahn has not stated a claim upon which relief can be granted pursuant to 42 U.S.C. §1985(2). See Point II of Brief for Respondent Avnet, Inc. in Opposition. Because the District Court did not consider these defenses below, but simply dismissed the claim based upon its reading of the intracorporate conspiracy doctrine, it would be inappropriate for this Court to consider these arguments in the first instance. Rather, the dismissal should be reversed and remanded for further proceedings, in which the District Court could rule for the first time on Avnet's other objections to the claim. In any event, these other objections raised by Avnet are specious.

---

[3] Of course, as a coconspirator Scharffenbarger need only have engaged in some of the acts taken in furtherance of the conspiracy. *See Old Sec. Life Ins. v. Continental Ill. Nat. Bank*, 740 F.2d 1384, 1397 (7th Cir. 1984).

A. Witnesses Have Standing to Pursue §1985(2) Claims

It is not necessary for a plaintiff claiming a violation of §1985(2) to have a personal stake in the outcome of the underlying litigation. As a *witness*, Kahn clearly was among the class of persons for whose benefit the statute was enacted. Section 1985 provides that in cases of conspiracy to deter a party or witness in any court of the United States from attending such court or testifying freely, fully and truthfully, "whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, *the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation*, against any one or more of the conspirators."

Under the plain language of Section 1985, a witness who is intimidated from testifying and is injured thereby has a cause of action against the conspirators.

While Avnet is technically correct in noting that the only Court of Appeals decision to determine whether nonlitigants have standing under §1985(2) held that they do not, *see David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987), Avnet itself has also cited to a case which casts doubt on *David's* conclusion. *See Rode v. Dellarciprete*, 845 F.2d 1195, 1206-1207 (3d Cir. 1988). In *Rode*, the Third Circuit rejected a §1985(2) claim because the plaintiff "was neither a party *nor a witness* in the *Clanagan* action." *Id.* at 1206 (emphasis added). The court described §1985(2) as a statute which "provides a cause of action based on the intimidation of witnesses in a federal court action." *Id.* The court noted three cases in which *witnesses* were given standing to sue under §1985(2). *Id.* at 1207, citing *Hoopes v. Nacrelli*, 512 F. Supp. 363, 368 (E.D. Pa. 1981); *Kelly v. Foreman*, 384 F. Supp. 1352, 1353 (S.D. Texas 1974); and *Crawford v. City of Houston*, 386 F. Supp. 187, 192 (S.D. Texas 1974).

In *Kelly*, the court observed that the statute clearly gives a cause of action to any person injured in the course of the conspiracy. 384 F. Supp. at 1353. In *Hoopes*, the court held that "Under this segment of § 1985, a party states a claim so long as he alleges a conspiracy to deter him from or retaliate against him for testifying in a court proceeding." 512 F. Supp. at 368.

These cases construe the statute's plain meaning as well as the policy reasons behind the statute in order to conclude that it gives an intimidated witness the right to sue. In contrast, *David*, the single case cited by Avnet to the contrary, simply states that a §1985(2) action requires that the litigant in the underlying action was hampered by witness intimidation in presenting an effective case. 820 F.2d at 1040. No rationale is presented for this conclusion, and the only authority cited in its support does *not* support the conclusion. *See Chahal v. Paine Webber, Inc.*, 725 F.2d 20 (2d Cir. 1984). In fact, In *Chahal* the court concluded that §1985(2) is to be construed *liberally*. 725 F.2d at 24.

In *Chahal*, the court also stated:

> The essential allegations of a §1985(2) claim of witness intimidation are (1) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) *results in injury to the plaintiff.*

Id. at 23 (emphasis added). Kahn, the plaintiff herein, was injured by the acts of Avnet, Sheib and Scharffenberger to deter him from testifying, thus qualifying for the protection of §1985(2). To the extent that *David* requires a showing of injury to the litigant in the underlying action, it grafts a wholly unwarranted, extraneous element onto §1985(2) claims which has no support in either the statutory language of the statute nor the policies underlying it.

B. Kahn Was A Witness Under §1985(2)

Avnet contends that Kahn was not a witness in the Dekalb action, but was simply an attorney supervising document production and that as such, he is not protected by §1985(2).

In fact Kahn *was* a witness. *His deposition was taken in the Dekalb action.*[4] Prior to the commencement of the Dekalb suit, he had engaged in discussions with Dekalb on behalf of Avnet's DNA subsidiary and its DNA division regarding DNA's ability to give Dekalb adequate assurances of performance of the contract which was the subject of the suit. As the Complaint alleged, this was the critical issue of the lawsuit. (¶15, Appendix D at D-3.) It was also the subject matter of the document Kahn was instructed to destroy and lie about under oath. *See* ¶10 of the Complaint. (Appendix D at D-2.)

Further, as ¶12 of the Complaint pleads (*see* Appendix D at D-3), Kahn was required to sign under oath an affidavit stating that he had supervised the production of documents and that such production was complete, and to answer interrogatories covering the subject matter of the incriminating document which Avnet instructed him to destroy. *See* Rules 33 and 34, Fed.R.Civ.P. Kahn pleaded (¶14) that he was terminated as an employee of Avnet for refusing to testify falsely in a production of documents affidavit and in answering certain Dekalb interrogatories and that Avnet knew or should have known that he would be called as a witness in the Dekalb suit because of his involvement in prelitigation negotiations with the plaintiff in that suit (¶15). *See also* ¶16.

In *Chahal*, the court rejected Avnet's narrow and grudging interpretation of the word "witness." The court made it clear that §1985 should be interpreted liberally and that the protections of §1985 apply to "potential" witnesses as well as to those who actually appear and testify in court. *Id.* at 24. The Third Circuit agreed with such a broad interpretation and rejected Avnet's "crabbed and unwarranted reading of the statute" in *Malley-Duff & Associates v. Crown Life Ins. Co.*, 792 F.2d 341, 355 (3d Cir. 1986), in a holding that would clearly apply to Kahn:

---

4 When Kahn was asked whether his termination related to the DeKalb litigation, Avnet's attorney strenuously objected on the ground of attorney-client privilege. (JA 167, 169.)

> [W]e think that a person asked to provide discovery in such a case, regardless of where or in what form, is for these purposes a witness "in" the court. Indeed, the statute distinguishes between being deterred from "attending such court' and from "testifying to any matter pending therein." As a policy matter, we think the statute's less than pellucid language should be read with a view to the fact that pretrial proceedings in 1870 did not have the importance they have today. Because cases can be won or lost, or their value substantially diminished, as a result of intimidation that affects witnesses' willingness or ability to provide discovery, we hold that the statute applies."

In contrast, not one of the reported cases cited by Avnet for the proposition that only *live* testimony *in court* is covered by §1985(2) actually stands for that proposition.

C. Kahn Suffered "Injury" Pursuant to §1985

Avnet suggests that because under New York law, Kahn was an at will employee who could be dismissed for any reason, he was not "injured" pursuant to §1985. This is akin to suggesting that a New York employer can discharge an employee in an act of racial discrimination since the employee was "at will" and could be discharged "for any reason, or for no reason at all." Clearly, New York's law of wrongful discharge does not pre-empt federal civil rights statutes.[5] If Kahn was threatened with discharge and ultimately discharged from his job as part of a conspiracy to intimidate or deter him from testifying truthfully, he suffered injury cognizable under §1985(2). *See also Tims*

---

[5] Indeed, the modern New York case relied upon by Avnet for the doctrine of at will employment nevertheless held that the plaintiff could state a claim for age discrimination. *See Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 264 N.Y.S.2d 232 (1983).

v. Board of Education of McNeil, Arkansas, 452 F.2d 551, 552 (8th Cir. 1971)(at will employment doctrine does not permit discharge of employee on grounds violative of constitutional or legal rights); *Wynn v. Boeing Military Airplane Co.*, 595 F. Supp. 727, 729 (D. Kans. 1984)(same).

Even if Avnet were correct and Kahn could not recover for lost wages due to his "at will" status, damages recoverable under §1985(2) are not limited to such economic damages. §1985 provides for damages to one who is injured "in his person or property." §1985(3). Damages recoverable include mental pain and suffering. *Bueno v. City of Donna*, 714 F.2d 484, 496 n.11 (5th Cir. 1983). Kahn alleged both types of damages. *See* ¶17 of the Complaint (Appendix D at D-4).

III
The Civil Rights Claim Was Central To Kahn's Case

The "Counterstatement of the Case" in Avnet's brief makes it appear that Kahn's civil rights claim was a secondary element of this action. In fact, it was central to his case. This is demonstrated not only by the fact that it was pleaded as the first claim for relief, but also by the fact that the central theme of Kahn's case was that he was threatened with discharge, and ultimately discharged, unless he destroyed evidence and testified falsely regarding the evidence.

While many jurisdictions would recognize such conduct by Avnet as a basis for a claim of wrongful discharge, New York adheres to a strict doctrine of at will employment. *See Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 264 N.Y.S.2d 232 (1983). Thus, the §1985(2) claim provided the most favorable basis for relief.

Because of New York's refusal to recognize the doctrine of wrongful discharge and because of strategic changes of position taken by Avnet at trial and rulings by the District Court, the jury was never able to learn of the instructions to Kahn to destroy evidence and testify falsely. In fact, although Kahn's counsel advised the jury in his opening statement that the evidence would reveal such conduct by Avnet, the District Court prevented Kahn from presenting such evidence. Thus, the jury was left with the false impression that Kahn had *no* evidence of what was

the central theme of his case. Moreover, because Avnet decided, at trial, to admit that Kahn was not discharged for cause (since New law permits discharge without cause), Avnet effectively precluded Kahn from presenting any evidence as to the reasons for his discharge (including the threats and pressure to testify falsely and destroy evidence).

The result was that the jury was able to view only half of the picture of events underlying the suit. It was natural for the jury to reject Kahn's claim that Avnet's president had orally agreed that he would not be discharged except for cause (a claim that, in any event, was not Kahn's central theory of relief) because the jury was not able to hear all of the evidence. Moreover, Avnet was able to argue to the jury, apparently successfully, that Kahn had recently fabricated his claim, because Kahn was not permitted to testify about the claims he had made, immediately after his discharge, that he was being fired for refusing to destroy evidence.

Avnet's brief also suggests that there is nothing to Kahn's §1985(2) claim because Avnet did, in fact, "voluntarily" produce the "smoking gun" document in the Dekalb suit after Kahn was discharged. Avnet omits to note that the production was pursuant to a discovery order; thus it was hardly voluntary. Moreover, the evidence which Kahn would have presented, had the District Court permitted him, would have demonstrated that it was *because of* Kahn's discharge, and the resulting controversy among Avnet's defense counsel in the Dekalb suit, that the decision was made to produce the document.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN L. ISAACMAN
DAVID O. CARSON*
STEPHEN E. NORRIS
345 North Maple Drive, Suite 200
Beverly Hills, California 90210
(213) 278-1111

Counsel for Petitioner

*Counsel of Record

July 29, 1988

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on July 29, 1988, I served the within *Reply Brief In Support of Petition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court One First Street, N.E. Washington, D.C. 20543 (Original + 40 Copies)	George Graff, Esq. Milgrim, Thomajan & Lee, P.C. 405 Lexington Avenue New York, New York 10174 (3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 29, 1988, at Los Angeles, California.

Claude A. Lagardere
(Original signed)

OFFICIAL SEAL
SALLY H JONES
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires MAY 22, 1990